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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JON ALLEN SPIEGEL,

Defendant and Appellant.

A152169

(Solano County
Super. Ct. No. FCR315364)

MEMORANDUM OPINION¹

Defendant Jon Allen Spiegel was charged by felony complaint with assault with a deadly weapon (Pen. Code,² § 245, subd. (a)(1)), but ultimately convicted by a jury only of the lesser included offense of simple assault (§ 240). The crime occurred in mid-May 2015 in the street just outside a courthouse after Spiegel and his ex-wife attended divorce proceedings. The victim was in a relationship with Spiegel's ex-wife and leaving the courthouse with her. The prosecution's theory of the case was that Spiegel initiated the confrontation and attacked the victim by slashing at him with a knife. Conversely, the defense posited that Spiegel pulled out a knife in self-defense because the victim charged at him, but Spiegel did not try to strike him with it.

¹ We resolve this case by a memorandum opinion pursuant to the California Standards of Judicial Administration, standard 8.1(3).

² All further statutory references are to the Penal Code.

Spiegel now appeals, contending surveillance cameras maintained on the county building across the street from the courthouse documented the crime and could potentially have assisted his defense. He argues that the prosecution was aware of the footage's potential exculpatory value and that it acted in bad faith by failing to obtain the footage after being requested by the trial court and the defense to do so. The prosecution's failure to obtain and preserve the footage, he claims, violated his due process rights under *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*). The claim is without merit.

“ ‘ “Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence ‘that might be expected to play a significant role in the suspect’s defense.’ [Citations.] To fall within the scope of this duty, the evidence ‘must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.’ [Citations.] The state’s responsibility is further limited when the defendant’s challenge is to ‘the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.’ [Citation.] In such case, ‘unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.’ ” ’ ” (*People v. Farnam* (2002) 28 Cal.4th 107, 166.)

We review the trial court’s decision on a *Trombetta/Youngblood* motion under the substantial evidence standard. (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 774 (*Alvarez*)). Under that standard, we review the whole record in the light most favorable to the judgment and do not reweigh evidence. (*Ibid.*)

In support of his *Trombetta/Youngblood* motion, Spiegel relied solely on the transcripts and court records of prior proceedings showing that defense counsel and the trial court asked the People to obtain the surveillance video. As the trial court’s ruling on

the motion recognized, however, nothing in the record established that the surveillance cameras were recording at the time of the incident or that they would have captured the incident itself, which took place in the middle of the street. The only portion of the record that Spiegel seems to rely on to establish the existence of footage that captured the incident is defense counsel's representation to the trial court at the September 11, 2015 hearing that "the camera shows . . . the area exactly where this [incident] was." Defense counsel, however, said this in the midst of asking the prosecution to follow up on its request for the footage, not at an adjudicatory hearing regarding the existence of the footage or what it would show. Accordingly, we decline to view defense counsel's statement as establishing the truth of his factual assertions regarding the existence and content of the surveillance footage. (See *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 473.) On this record, Spiegel failed to demonstrate the existence of footage possessing an exculpatory value that was apparent before it was destroyed. (*Trombetta, supra*, 467 U.S. at pp. 488–489.)

Assuming arguendo the surveillance footage existed and captured the incident, Spiegel acknowledges that, at best, such unwatched footage was "potentially useful," which would require the defense to show bad faith. (*Youngblood, supra*, 488 U.S. at pp. 57–58.) "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id.* at p. 56, fn. *.) Negligence alone cannot support a finding of bad faith. (*Id.* at p. 58; *People v. Huston* (1989) 210 Cal.App.3d 192, 213.) Case law has also construed "bad faith" to mean "malice" or a " 'design to seek an unconscionable advantage over the defendant.' " (*People v. Coles* (2005) 134 Cal.App.4th 1049, 1055; see *Youngblood*, at p. 58 [bad faith is shown where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"].)

Here, the record amply supports the trial court's determination that Spiegel failed to demonstrate bad faith. In the transcript of the June 2017 hearing on the motion, the prosecutor who litigated the motion (Cunnane) represented that the People requested the footage at least twice—on August 5, 2015 and in July 2016—to no avail. Cunnane was not the same deputy district attorney assigned to the case at the time of the August 2015 request. Cunnane indicated that when the prosecution made the August 2015 request, it mistakenly asked the investigating police department to produce footage in its possession, rather than asking it to obtain the video from the county. Nothing in the record, however, suggests that this was anything but a negligent mistake on the part of the deputy district attorney handling the case in August 2015. Moreover, Spiegel presented no evidence at the hearing to support that the inefficacy of the prosecution's mid-2016 request was due to bad faith, and no evidence regarding whether anyone from the prosecutor's office conducted any follow-up during the time between the August 2015 request and the July 2016 request, and if not, why not. Instead, at the hearing on the motion, even defense counsel asserted he did not "believe there was any malicious intent on anybody's part," just that the issue of obtaining the footage "fell through the cracks."

Spiegel's reliance on *Alvarez, supra*, 229 Cal.App.4th 761, and *U.S. v. Zaragoza-Moreira* (9th Cir. 2015) 780 F.3d 971 (*Zaragoza-Moreira*), is misplaced. In both of those cases, unlike here, there was evidence showing that surveillance footage captured the specific areas where the crimes occurred. (*Alvarez*, at pp. 768, 775–776; *Zaragoza-Moreira*, at p. 980.) The respective records also showed that law enforcement officials knew the surveillance footage was potentially useful, yet they made no attempt to preserve, view, or obtain the footage. (*Alvarez*, at p. 777; *Zaragoza-Moreira*, at p. 980.) Here, it is undisputed that the prosecution tried at least twice to obtain the footage.

Given this record, we conclude the trial court properly denied the *Trombetta/Youngblood* motion. The judgment is affirmed.

Fujisaki, J.

WE CONCUR:

Siggins, P.J.

Petrou, J.

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